With the information on record it is clear that not only the appellant was personally involved in this smuggling but also all members of the convoy had a hand in it. I should not however mete the penalty on him solely because he was the officer-in-charge of the convoy. I note the list of goods found in BK 2892 amount to the value of $5,399.40 on which duty of $2,908.86 was payable. It is obvious that the appellant did not have sufficient resources but the traders and merchants have unfortunately been allowed to go scot-free since the appellant and the other members of the convoy chose to keep silent and not inform the police and the customs of these unscrupulous scoundrels. Under section 180 of the Criminal Procedure Code the learned deputy public prosecutor can stay proceedings on the third charge which would amount to an acquittal unless the appellant successfully appeals against my judgment.

On grounds (12) and (13), which latter ground was admitted by me on the day of the hearing, they complained of several unsatisfactory features in the trial before the learned president. I have already dealt in the early part of my judgment with most of the grounds and I say again that I am satisfied if there were any unsatisfactory features as contended by counsel for the appellant, I can find in this case no ground for believing that these have occasioned a failure of justice. I therefore confirm the conviction and fine of the appellant on the first charge and vary the fine on the second charge to one of $100. The appeal is dismissed.

Appeal dismissed.

TEOH KHOON LIM v. LIM AH CHOO & ANOR.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 3, 1970]

[Penang — Federal Court Civil Appeal No. X. 117 of 1969]

Negligence — Vehicle driven by person to whom car has been loaned by owner — Agency — Whether owner liable for negligent driving of borrower.

In this case the learned trial judge had found that one So Pek and his son were killed by the negligent driving of Mahmood bin Hashim, the first defendant (second respondent in this appeal) and awarded damages both against him and the owner of the vehicle, the second defendant (appellant herein). The second defendant had lent the car to the first defendant for the purpose of conveying the first defendant's meat. The second defendant appealed.

Held, allowing the appeal: the evidence in this case showed that the first defendant used the car for his own benefit and on his own concern and therefore the second defendant could not be made liable for the negligence of the first defendant.

Cases referred to:-

(1) *E.A. Long* v. *Wing Chiu Wah* [1957] M.L.J. 163.

(2) *Rambarran* v. *Gurrucharran* [1970] 1 All E.R. 749.

(3) *Manawatu County* v. *Rowe* [1956] N.Z.L.R. 78.

(4) *Barnard* v. *Sully* (1931) 47 T.L.R. 557.

(5) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188.

The following additional cases were cited in argument: *Ormord & Anor.* v. *Crosville Motor Services Ltd. & Anor.* [1953] 2 All E.R. 753, 754; *Lee Chong* v. *Tan Kwee Low & Anor.* [1961] M.L.J. 98, 104; *Parker* v. *Miller* (1926) 42 T.L.R. 408, 409; *Samson* v. *Aitchison* [1912] A.C. 844, 850.

FEDERAL COURT.

Khoo Eng Chin for the appellant.

A. Jayadeva for the 1st respondent.

2nd respondent in person.

Azmi L.P.: The learned trial judge found that one So Pek and his son Saw Ah Teong were killed by the negligent driving of Mahmood bin Hashim, the first defendant and awarded damages both against him and the owner of the vehicle, the second defendant.

At the trial, the first defendant did not file his defence nor did he attend it as a party to the suit. He was, however, subpoenaed by the second defendant and gave evidence on behalf of the latter. At the hearing second defendant did not dispute the question of negligence and with agreement of both counsel the court proceeded to decide the only issue as to whether the first defendant was driving the car as the second defendant's servant or agent at the time of the accident.

The second defendant was the owner of the car and he loaned it to the first defendant for the purpose of conveying first defendant's meat. In the course of their evidence the learned judge found that they contradicted each other on certain facts which in the view of the trial judge were important. These contradictions may be briefly stated to be in reference to the question whether the first defendant had also loaned his car to the second defendant previously and whether as a fact they were old friends. The learned judge finally on this question came to the following conclusions: —

"There are other inconsistencies in the testimony of both the defendants in this action which have led me to believe that first defendant was a mere acquaintance of the second defendant, and that what was represented as a gratuitous loan of the car between friends of long standing was in fact a surreptitious hiring.

I am therefore satisfied, on the balance of probabilities that the car was, by this fact of hiring, being used, at the time of the accident for a purpose in which the second defendant had both interest and concern."

The second defendant appealed against that finding.

Before us it was argued that the learned judge was wrong to have drawn an inference that the gratuitous loan of the car by the second defendant to the first defendant was in fact a surreptitious hiring when there was no evidence before him for such an inference to be drawn. And secondly even if he was right in his inference that the loan of the car was in fact a surreptitious hiring, he was wrong in law to have held that the car was, by that fact of hiring, being used at the time of the accident, by the first defendant for the purpose in which the second defendant had both interest and concern.

In his judgment the learned judge cited the following passage from the judgment of Rigby J. (as he then was) in *E. A. Long* v. *Wong Chiu Wah*: [1]

"In my view the owner of a hired car who hires his car for reward to another party with the full knowledge that the

car is being used for teaching a third party to drive, cannot be heard to say in the words of Denning L.J. that he has hired the car to the third party for the purpose in which he, as owner 'has no interest or concern'. For these reasons I am of opinion that the liability of the first defendant for the negligence of the second defendant as his agent has been fully established."

The question whether a person is an agent of another is substantially a question of fact. The Privy Council in the recent case of *Rambarran* v. *Gurrucharran*[2] referred to a judgment of the Court of Appeal of New Zealand in the case of *Manawatu County* v. *Rowe*[3] and summarised the principles laid down by that court in the following terms:

"After considering the English cases of *Barnard* v. *Sully*[4] and *Hewitt* v. *Bonvin*[5] and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus:—

(1) The onus of proof of agency rests on the party who alleges it.

(2) An inference can be drawn from ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue or if such other evidence as there is, fails to counterbalance it.

(3) It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concern."

In my view even if assuming that the learned judge was right that this was a case of surreptitious hiring, that fact has not created a relationship of principal and agent as between the two defendants in this case. The evidence in this case would appear in my view conclusive that the first defendant used the car for his own benefit and on his own concern and for that reason I would say that the second defendant would not be liable for the negligence of the first defendant. I would allow the appeal with costs here and in the court below.

Suffian F.J.: With respect I agree with my Lord, the Lord President. I agree that this appeal be allowed with costs here and below.

The car responsible for the accident was owned by the second defendant (appellant). There was therefore a presumption that the driver who drove it at the time of the accident (first defendant and second respondent here) was the agent of the owner. Whether or not he was an agent is a question of fact. As was said in the Privy Council case referred to by my Lord the Lord President, the owner can repel the inference that the driver was his agent in one of two ways: one, by giving or calling evidence as to the driver's object in making the journey in question, and, secondly, by simply asserting that the car was not being driven for the owner's purpose and proving that assertion by means of such supporting evidence as was available to him.

Here the owner adopted both ways of proving that he had no interest or concern in the driver's journey. The driver used the car to convey his own goods to some people in Kepala Batas and the owner did not ask him to convey anything for him or do anything for him there. Even if it is true that the car had been surreptitiously hired, I do not think that in these circumstances it can be said that the owner had any interest or concern in the driver's journey.

As the owner had no interest or concern in the driver's journey, he (the owner) is not responsible for the driver's negligence.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Khoo & Sidhu; Jayadeva, Zahir & Ismi.*

MAHA SYNDICATE v. COOPERATIVE EXPORTVERENIGING "VECOFA" U.A. & ANOR.

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) July 3, 1970]

[Penang — Federal Court Civil Appeal No. X. 118 of 1969]

Bills of Exchange — Definition of — Whether a document "payable at 10 days sight D/A on arrival of steamer" is a bill of exchange — Bills of Exchange Ordinance, 1949, ss. 3 and 11.

Evidence — Technical expressions — Evidence Ordinance, 1950, ss. 93 and 98.

In this case the plaintiffs had drawn on the defendants bills of exchange which were expressed to be "payable at 10 days sight D/A on arrival of steamer" in the case of the first and third bills and at "60 days sight D/A from date of arrival of vessel" in the case of the second bill. Judgment was given against the defendants as acceptors on the bills of exchange ([1970] 1 M.L.J. 187). The defendants appealed and on the appeal it was argued that none of the documents was an unconditional order to pay on demand or at a fixed or determinable future time, but that all the bills were expressed to be payable on a contigency and were therefore not bills of exchange within the meaning of the Bills of Exchange Ordinance, 1949. Two witnesses were called on behalf of the plaintiff at the trial to show that payment on the bills was not conditional on arrival of the steamer and their evidence was accepted by the learned trial judge.

Held, dismissing the appeal: (1) in view of the uncontroverted evidence about the bills of exchange which was accepted, the learned trial judge was right in giving judgment for the plaintiff;

(2) in this case the evidence was rightly admitted under section 98 of the Evidence Ordinance to show the meaning of "technical expressions and words used in a peculiar sense."

Cases referred to:-

(1) *Palmer & Ors.* v. *Pratt* 2 Bing. 185, 192.

(2) *The Cardiff Boarding Master's Association* v. *Cory & Sons* (1893) 9 T.L.R. 388.

The following additional cases were cited in argument: *Das* v. *Pershad* 46 I.A. 33, 35; *Palmer* v. *Pratt* 130 E.R. 277; *Alexander* v. *Thomas* 117 E.R. 906; *Willliamson & Ors.* v. *Rider* [1962] 2 All E.R. 268, 272; *Orbit Mining & Trading Co. Ltd.* v. *Westminster Bank Ltd.* [1962] 3 All E.R. 565; *Colehan* v. *Cooke* (1742) 125 E.R. 1231, 1234; *Rosenheim* v. *C.B. of Australia* (1922) 31 C.L.R. 46; *Hill* v. *Halford* (1801) 126 E.R. 1357; *Browne* v. *Pickering* 4 T.L.R. 726; *W. Bank Ltd.* v. *Zang* [1966] 1 All E.R. 114, 117; *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1955] 3 All E.R. 864; *R. Mohanlal* v. *M. Kasturchand* A.I.R. 1949 Nagpur 21, (c); *H. Barua* v. *G.M. Chowdhry* A.I.R. 1931 Cal. 387, (a); *Jameson & Co.* v. *Phutt* A.I.R. 1936 Cal. 291; *Savage & Ors.* v. *Uwechia* [1961] 1 All E.R. 830; *Cossey* v. *McManus* 6 English & Empire Digest 179, 283; *Parminster* v. *Symons* 1 E.R. 780, 783.